CERTIFICATE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 544

THE UNITED STATES OF AMERICA

vs.

EDWARD H. MARXEN, TRUSTEE OF MONTEREY BREWING COMPANY, A CORPORATION, BANKRUPT

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED DECEMBER 27, 1938

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1 In United States Circuit Court of Appeals for the Ninth Circuit

IN THE MATTER OF MONTEREY BREWING COMPANY, A CORPORATION, BANKRUPT

No. 8861. Dec. 17, 1938

UNITED STATES OF AMERICA, APPELLANT

vs.

EDWARD H. MARXEN, TRUSTEE OF MONTEREY BREWING COMPANY, A CORPORATION, BANKRUPT, APPELLEE

Certificate to the Supreme Court of the United States of questions of law upon which the Circuit Court of Appeals for the Ninth Circuit desires instruction for the proper decision of a cause

To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

Statement of case

We have pending in this court an appeal by the United States from that portion of an order of the trial court allowing a claim against the bankrupt estate of the Monterey Brewing Company, a corporation, whereby the trial court denied priority to the claim. The claim purports to be one on behalf of the United States of America. It arises out of the acts of the Federal Housing Administrator under the National Housing Act (approved June 27, 1934, 48 Stats. 1246; 12 U. S. C. A. § 1703). The undisputed facts with reference to the claim of priority are as follows:

On January 2, 1936, the California Bank, a banking corporation, loaned $609.39 to the Monterey Brewing Company, for which indebtedness that company executed a promissory note. This indebt-
2 edness was duly reported by the California Bank to the Federal Housing Administrator (hereafter called the Administrator) in pursuance of a policy of insurance issued by the Administrator to the California Bank on August 10, 1934. The California Bank was insured by the said Administrator against losses which it might sustain as result of loans made by it for the purpose of financing alterations, repairs, improvements, and additions on real property, and to purchase and install equipment and machinery on real property.

Upon the report of the loan by the California Bank to the Administrator the insurer, in accordance with the contract of insurance and under the provisions of regulations 15 and 17 adopted by the Federal Housing Administrator, became responsible to the California Bank for the payment of the indebtedness of the Monterey Brewing Company in the event said debtor should fail to pay the same.

Payments were made by the Monterey Brewing Company reducing the amount of the principal indebtedness to $373.33 on February 2, 1937. On that day the debtor defaulted in the payment of its debt. Regulation 15 provides that the insured party may not make claim upon the Administrator until 60 days after such default, which period expired on April 3, 1937.

On April 5, 1937, the Monterey Brewing Company filed its petition and was adjudicated a bankrupt. Thereafter, in accordance with the insurance policy, the California Bank, on July 3, 1937, made a claim upon the Administrator for the payment to it of the balance of indebtedness due the bank by the Monterey Brewing Company. On August 4, 1937, the Administrator, after auditing the claim and finding $384.56 due thereon, paid to the California Bank that sum by draft drawn on the Treasury of the United States, whereupon the California Bank assigned the aforesaid note to the United States of America. On November 18, 1937, the Administrator filed a claim upon said note in said bankrupt estate, purporting to be on behalf of and in the name of the United States of America, and stating the foregoing facts.

On January 18, 1938, the trustee of the bankrupt estate objected to the allowance of the claim as a prior claim of the United States, contending that it should be allowed only as a general claim.

3 On January 27, 1938, the referee in bankruptcy disallowed the claim of the United States as a preferred or prior claim but allowed the same as a general claim, finding as a fact that although in the name of the United States it was in favor of the Administrator.

Upon petition to review, the referee's order was confirmed and approved by the District Court and an appeal to this court followed.

Questions presented

The question before us is whether this claim so presented is entitled to priority under Sec. 64 (b) of the bankruptcy act [11 U. S. C. A. § 104 (b), (7)], giving priority to "debts owing to any person who by the laws of the states or the United States is entitled to priority: provided, that the term 'person' as used in this section shall include corporations, the United States, and the several states and territories of the United States." Priority under this section is claimed by reason of the provisions of Sec. 3466 of the Revised Statutes of the United States (31 U. S. C. A. § 191), which provides that "whenever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied; and the priority established shall extend * * * to cases in which an act of bankruptcy is committed."

This question, in a slightly different form, has been decided by this court. In Federal Housing Administration v. Moore, 90 F. 2d 32, this court held that a claim upon a note assigned after bankruptcy to the Federal Housing Administrator made by him against a bankrupt estate, based upon a payment of the insured debt after the adjudication of bankruptcy but in pursuance of an insurance obligation en-

tered into by him with the creditor of the bankrupt before bankruptcy, was not entitled to priority for two reasons: first, that the claim was not a claim of the United States and, second, that the Administrator could not acquire priority by the assignment to him of a claim of the bank which had been insured by the Federal Housing Administrator. The trial court in the case at bar held that our decision in Administrator v. Moore, supra, was controlling in the present matter and for that reason denied priority.

After our decision of May 10, 1937, in Administrator v. Moore, supra, the Circuit Court of Appeals for the Eighth Circuit in
4 Wagner v. McDonald, 96 F. 2d. 273, sustained an order allowing the Administrator priority where the claim against the bankrupt was assigned to the Administrator before the bankruptcy of the principal debtor. It referred to our decision in Administrator v. Moore, supra, and distinguished its decision from ours upon the ground that "it does not appear that the claim was filed on behalf of the United States nor that the debt upon which the claim was based was acquired by the administrator acting for the United States." It said: "The court in the Moore case emphasized the fact that the debt was assigned to the administrator after the date of the adjudication."

There is thus a direct conflict between the decision of the Circuit Court of Appeals for the Eighth Circuit (Wagner v. McDonald, supra) sustaining priority in favor of the Administrator, and the decision of this circuit (Administrator v. Moore, supra), denying such priority.

The authorities seem to indicate that under the provisions of Sec. 63 of the Bankruptcy Act (11 U. S. C. A. § 103), the Administrator in the case at bar would have a provable claim even before the payment by him of the obligation of the debtor for which he is responsible. Williams v. U. S. Fidelity, etc., Co., 236 U. S. 549; Cf. In the Matter of the Application of the People of the State of New York, by Jesse S. Phillips, Superintendent of Insurance, appellant, for an order to take possession of the property and liquidate the business of the Casualty Company of America. In the Matter of the claim of the United States of America, respondent, 134 N. E. 571; 232 N. Y. 559. See also, 8 C. J. Sec. p. 1255, § 397.

It would seem to us that if the United States, at the time of bankruptcy, had a provable claim against the estate of the bankrupt by reason of its contract insuring the California Bank the payment of the obligation of the bankrupt to it, to which claim, as an insurer, priority would attach, such priority would not be lost or affected by the fact that subsequent to the adjudication of bankruptcy the Federal Housing Administrator paid the insured bank and accepted an assignment of its claim against the bankrupt and thereafter presented a claim against the bankrupt upon the assigned claim.

In this connection it should be observed that the Bankruptcy Act expressly provides for the subrogation in favor of a surety
5 who pays the debt of the bankrupt for which he is surety. Subdivision (i) of Sec. 57 of the Bankruptcy Act [11 U. S.

C. A. § 93, sub. (i)] provides that "whenever a creditor whose claim against the bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor." This section, it will be observed, provides for the filing of the claim by the surety (the United States or the Administrator, as the case may be) in the name of the creditor (the California Bank) and for the subrogation of the surety to the rights of the principal creditor (the California Bank).

The effect of our decision in Administrator v. Moore, supra, is that where the Administrator or, we think, the United States, is subrogated to the rights of a creditor under Sec. 57 (i), 11 U. S. C. A. § 93 (i), it has no right of priority.

The question arises as to whether the provisions of the Bankruptcy Act (§ 64 (b), supra) giving priority to the United States, are modified by the provisions of Sec. 57 (i) giving it the rights of the principal creditor by subrogation. That is to say, does the United States acquire greater rights than the creditor? In considering the controlling effect of the decision of this court in Administrator v. Moore, supra, under the doctrine of stare decisis we are not satisfied that a valid distinction can be drawn between the facts in that case and those in the case at bar, because of the fact that in the present case the Administrator caused the assignment to be made to the United States by name and applied to the court for the allowance of this claim of the United States under and by virtue of his authority as Administrator, whereas in the former case he presented the claim to the bankrupt estate as Administrator claiming to act by and on behalf of the United States. (Sloan Shipyards v. U. S. Fleet Corp., 258 U. S. 549, 570; Clallam Co. v. U. S., 263 U. S. 341.)

Because of the conflict between our prior decision in Administrator v. Moore, supra, and the decision of the Circuit Court of Appeals for the Eighth Circuit in Wagner v. McDonald, supra; and because
6 of our doubt as to the correctness of our decision, which was not rendered by the same three Circuit Judges to whom the present case is submitted; and because of the doubtful propriety of one group of Circuit Judges in a given circuit modifying or overruling a decision by other Circuit Judges in such circuit; and because of the importance of the question, we submit to the Supreme Court of the United States, as provided in 28 U. S. C. A. § 346, for binding instructions, the following question:

Question certified

Where, prior to the filing of a petition for and adjudication in bankruptcy of the maker of a promissory note payable to a bank, the Federal Housing Administrator, under the provisions of the National Housing Act, insured the payee bank against the nonpayment of the note by its maker, upon which note the maker became in default more

than sixty days prior to said filing and adjudication, and upon demand of the insured bank made after the adjudication, the Federal Housing Administrator paid to the bank its claim arising from such default, and procured an assignment to the United States of the claim of the insured bank against the bankrupt, which claim had not been presented or proved in bankruptcy by the insured bank, and presented such claim in the name of the United States to the trustee in bankruptcy having before him other allowed claims against the bankrupt, is such claim entitled to priority over such other claims under sec. 3466 of the Revised Statutes (31 U. S. C. A. § 191) by reason of the provisions of sec. 64 (b) (7) [11 U. S. C. A. § 104 (b) (7)].

CURTIS D. WILBUR,
Circuit Judge.
WILLIAM DENMAN,
Circuit Judge.
WILLIAM HEALY,
Circuit Judge.

[Endorsed:] Certificate to the Supreme Court of the United States of questions of law upon which the Circuit Court of Appeals for the Ninth Circuit desi[illegible] instruction for the proper decision of a cause. Filed Dec. 17, 19[illegible] Paul P. O'Brien, Clerk.

A true copy,
Attest, December 20, 1938.

[SEAL] PAUL P. O'BRIEN, *Clerk.*

Certificate. Enter: Attorney General. File No. 43,029. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 544. The United States of America vs. Edward H. Marxen, Trustee of Monterey Brewing Company, a corporation, Bankrupt. Filed December 27, 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1939